DE 00-162

ISO NEW ENGLAND, INC.

Request for Confidential Treatment

Order Granting Request for Confidential Treatment

O R D E R N O. 23,590

November 20, 2000

This docket requires us to determine whether it is consistent with applicable New Hampshire law for us to treat as confidential certain data about the operation of New England's wholesale electricity market, voluntarily shared with the New Hampshire Public Utilities Commission (Commission) by the entity that operates the market, ISO New England, Inc. (the ISO).

We opened the docket on July 17, 2000, upon our receipt of ISO New England's motion under Puc 204.06 for confidential treatment of certain portions of ISO's Market Reports covering two quarters, involving May through October of 1999. Thereafter, on August 9, 2000, the ISO submitted a second request for confidential treatment, this one covering a document titled "Appendix 1" that the ISO filed with the Federal Energy Regulatory Commission (FERC) on May 8, 2000 in FERC docket nos. EL00-62 and ER00-2052.

As noted in the ISO's two requests for confidential treatment, the documents at issue both relate to New England

Power Pool (NEPOOL) Market Rule and Procedure 17 (Market Rule 17), which have been accepted by the FERC. Market Rule 17 is entitled "Market Monitoring, Reporting and Market Power Mitigation" and set forth the ISO's responsibilities with respect to monitoring and mitigating market power problems that arise in the New England Power Pool. Market Rule 17 requires the ISO to issue a "Quarterly Report for Regulators" to be made available to state and federal authorities with jurisdiction over electricity matters, as well as to direct participants in NEPOOL. According to the ISO, the documents for which it seeks confidential treatment here were all prepared pursuant to Market Rule 17.

The New Hampshire Right-to-Know Law generally provides each citizen with the right to inspect all public records in the possession of the Commission. *See* RSA 91-A:4, I. The statute contains an exception, invoked here, for "confidential, commercial or financial information." RSA 91-A:5, IV. In *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997), the New Hampshire Supreme Court provided a framework for analyzing requests to employ this exception to shield from public disclosure documents that would otherwise be deemed public records. There must be a determination of whether the information is

confidential, commercial or financial information "*and* whether disclosure would constitute an invasion of privacy." *Id*. at 552 (emphasis in original, citations omitted). "An expansive construction of these terms must be avoided," lest the exemption "swallow the rule." *Id*. at 552-53 (citations omitted). "Furthermore, the asserted private confidential, commercial, or financial interest must be balanced against the public's interest in disclosure, . . . since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." *Id*. at 553 (citations omitted).

The Court in *Union Leader* also noted that decisions of other jurisdictions can be helpful in construing the Right-to-Know Law, given that "other similar acts, because they are *in pari materia*, are interpretively helpful, especially in understanding the necessary accommodation of the competing interests involved." *Id*. at 546 (citation omitted). Thus, "[f]ederal precedent is instructive in defining the terms 'confidential, commercial or financial'" in the New Hampshire statute. *Id*. at 552.

Like RSA 91-A, the federal Freedom of Information Act sets out a broad policy of public disclosure of documents

in the possession of the government, subject to an exception for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This exception was at issue in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F2d 871 (D.C. Cir. 1992), in which the *en banc* panel of the United States Court of Appeals for the District of Columbia Circuit considered the public availability of safety reports prepared by the Institute for Nuclear Power Operations and voluntarily transmitted to the federal Nuclear Regulatory Commission on condition that the agency would not release the information to other parties without the Institute's consent. Reaffirming its prior holding in *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the Circuit Court held the documents in question not subject to public disclosure. The Court's conclusion: "It is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability to secure such data on a cooperative basis and injure the provider's interest in preventing its unauthorized release." *Critical Mass*, 975 F.2d at 879. Thus, under the federal statute, "financial or commercial information provided to the Government on a

voluntary basis is 'confidential' for purposes of [the statutory exemption to disclosure] if it is of a kind that would customarily not be released to the person from whom it is obtained." *Id*.

The federal principle represents a concession to an ineluctable reality about the voluntary furnishing of information to a government agency by a private entity not regulated by the agency: Despite "the need of government policymakers to have access to commercial and financial data . . . [u]nless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of Government to make intelligent, well informed decisions will be impaired." *Id*. at 877, quoting *National Parks and Conservation Association v. Morton*, 498 F.2d at 767. In the context of the balancing test required under the *Union Leader* interpretation of the Right-to-Know law, in these circumstances the public's interest in disclosure is clearly outweighed by the countervailing reasons for maintaining the confidentiality of ISO bid data.

In fairness, it should be noted that Justice Ruth Bader Ginsberg, then a member of the Court that decided *Critical Mass*, filed a vigorous dissent to the *Critical Mass* decision that was joined by three of her colleagues. Justice

Ginsberg was troubled with the subjective process of defining whether information is among that which is customarily withheld from the public. *Critical Mass,* 975 F.2d at 885 (Ginsberg, J., dissenting). "Henceforth," she complained,

> in this circuit, it will do for an agency official to agree with the submitter's ascription of confidential status of confidential status to the information. There will be no objective check on, no judicial review alert to, the temptation of government and business officials to follow the path of least resistance and say 'confidential' whenever they seek to satisfy the government's vast information needs.

Id. (citation omitted).

We are mindful of Justice Ginsberg's concern, especially given the New Hampshire Supreme Court's explicit instructions to construe provisions of the Right-to-Know law favoring disclosure "broadly," to interpret exceptions to disclosure "restrictively," and, specifically, to determine whether a document is "confidential" within the meaning of RSA 91-A "objectively, and not based on the subjective expectations of the party generating it." *Union Leader*, 142 N.H. at 546, 553.

We nevertheless deem it appropriate to apply the *Critical Mass* principle to the documents at issue in this docket. As did the federal court, we believe it is reasonable

to recognize a distinction between information obtained by state agencies through the exercise of their authority and information that is useful to state agencies but is provided to them on a voluntary basis. The documents at issue here are generated pursuant to FERC-approved Market Rules. They are provided to this Commission in the context of the ISO's effort to assist the Commission and its staff in executing the statutory duty to keep informed "as to all public utilities in the state," RSA 374:4, which, in turn, justifies Commission monitoring of developments in regional electricity markets that are subject to FERC regulation.

Deeming such documents to be confidential, for purposes of the New Hampshire Right-to-Know statute, does not raise the specter of allowing self-serving determinations of confidentiality to govern in these circumstances. There is no risk of subjectivity here because, ultimately, documents provided by the ISO on a voluntary basis are disclosed on a mandatory basis to the FERC, and are held confidential for six months under FERC order. Such a lag period for disclosing bid information can help to prevent competitors from using the information to develop anti-competitive bidding strategies. In other words, we believe it is appropriate to defer to FERC determinations of confidentiality in this case, not on

supremacy grounds, but because we believe the Right-to-Know law is sufficiently flexible to permit the ISO to furnish market-sensitive data to the Commission voluntarily on the reasonable assumption that FERC-approved confidentiality principles will be honored within the Commission.

The FERC has, in fact, made a determination as to the confidentiality of individual NEPOOL bid data furnished to FERC by the ISO. The ISO is required to "disclose individual bid data with a six-month lag." *NSTAR Services Co. v. New England Power Pool*, 2000 WL 1100275 (FERC, July 26, 2000) at *10. According to the FERC,

> [t]he ISO should not reveal the names of individual bidders; however the data should be posted in a way that permits analysts to track each individual bidder's bids over time. We have required similar bid disclosure for [ISO New England mid-Atlantic counterpart] PJM, the New York ISO, and the California ISO. As we noted in those earlier cases, it is important for bid information to be released to the public in order to permit interested parties to monitor the market. Keeping the information confidential for six months before releasing the data will sufficiently protect the commercial sensitivity of the data.

Id. As the ISO's requests for confidential treatment make clear, the information it is seeking to protect concerns the names of bidders subject to mitigation measures, bid data and

certain ISO-generated analyses of the data. The FERC's ruling directly implicates this data, and we believe it is reasonable and consistent with New Hampshire law for the ISO, its market participants and the public to assume we will not make public data that would otherwise be kept confidential by the ISO under FERC-approved policies.

Based upon the foregoing, it is hereby

ORDERED, that the motions for confidential treatment of certain data provided to the Commission by ISO New England, Inc. concerning wholesale electricity bidders are GRANTED; and it is

FURTHER ORDERED, that this Order is subject to the ongoing authority of the Commission, on its own motion or on the motion of Staff or any party or any other member of the public to reconsider this Order in light of RSA 91-A, should circumstances so warrant. ISO New England, Inc.

By order of the Public Utilities Commission of New Hampshire this twentieth day of November, 2000.

Douglas L. Patch	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary